Office Supreme Court, U.S.
FILED
JUL 3 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-812
83-929

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GEORGE C. WALLACE, et al.,
Appellants

v.

ISHMAEL JAFFREE, et al.

BRIEF OF THE STATES' ATTORNEYS GENERAL AS AMICI CURIAE IN SUPPORT OF APPELLANTS

On Appeal from the United States Court of Appeals for the Eleventh Circuit.

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INTEREST OF THE AMICI CURIAE

The State of Delaware, by and through its Attorney General and the States of Arizona, Indiana, Louisiana, Oklahoma and Virginia, by and through their Attorneys General, respectfully present this brief as *amici curiae* in support of Appellants in this case.

In 1975, the Delaware legislature enacted a statute requiring public schools to set aside two or three minutes at the beginning of the school day for voluntary participation in "moral, philosophical, patriotic or religious activity." Del. Code Ann. tit. 14, §4101(b) (1975).

The Attorney General of Delaware in 1979 issued an Opinion construing this statute to be constitutional only insofar as it authorized silent prayer and other, non-religious, activities. Op. Del. Att'y. Gen. 79-I011 (App. hereto). Since 1979, public schools in Delaware have conducted a brief period of silence at the beginning of each school day. The States of Arizona, Indiana, Louisiana and Virginia each have statutes which require or allow public schools to conduct a short moment of silence for meditation and prayer, or meditation alone. Thus, the states have a substantial interest in this matter.

STATUTES INVOLVED

ALABAMA

Ala. Code §16-1-20.1 (1981):

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ARIZONA

Ariz. Rev. Stat. Ann. §15-222 (1981):

At the commencement of the first class of the day in the schools the teacher in charge of the room in which the first class is held shall announce that a period of silence not to exceed one minute in duration will be observed for meditation, and during that time no activities shall take place and silence shall be maintained.

DELAWARE

Del. Code. Ann. Tit. 14 §1401(b) (1975) as amended 1978)

During the initial period of study on each school day all students in the public schools of Delaware shall be granted 2 or 3 minutes to voluntarily participate in moral, philosophical, patriotic or religious activity. For purposes of this section, "religious activity" shall include voluntary prayer at the beginning of each school day.

INDIANA

Ind. Code §20-10.1-7-11 (1976)

In each public school classroom, at the opening of each school day the teacher in charge may or, if directed by his governing body, shall conduct a brief period of silent prayer or meditation with the participation of all students assembled. This silent prayer or meditation is not a religious service or exercise and may not be conducted as one, but is an opportunity for silent prayer or meditation on a religious theme for those so inclined or a moment of silent reflection on the anticipated activities of the day.

LOUISIANA

La. Rev. Stat. Ann. 17:2115(A) (1980)

Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent meditation, which shall not exceed five minutes. The brief time of silent meditation shall not be intended or identified as a religious exercise.

VIRGINIA

Va. Code §22.1-203 (1980)

In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the State either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division is authorized to establish the daily observance of one minute of silence in each classroom of the division.

Where such one-minute period of silence is instituted, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

SUMMARY OF THE ARGUMENT

Statutes which designate a few moments at the beginning of the school day to be used by public school children for silent meditation or prayer comport with the Establishment Clause of the First Amendment, both as this Court has applied that Clause and as the Framers of the First Amendment intended it to be applied.

A moment of silence accommodates those students whose faith urges them to begin the school day with prayer, as well as those who prefer to meditate, think or doze. It is entirely free of the coercion inherent in the spoken prayer and Bible reading invalidated in *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963).

Justice Brennan's concurring opinion in *Schempp* suggested that a moment of silence is a permissible exercise. Plaintiffs in *Schempp* and *Engel*, who sought invalidation of spoken prayer, expressly conceded the constitutionality of a moment of silence; lower courts and scholars have agreed, although not without dissent.

Under the traditional three-pronged Establishment Clause analysis as restated in *Lynch v. Donnelly*, _____ U.S. _____, 104 S. Ct. 1355, (1984), moments of silence neither establish nor tend to establish a religion or religious faith. In reality, silent moments are by nature entirely non-coercive, respecting equally the rights of children of all beliefs.

The statutes facially reflect both the religious purpose of accommodating silent prayer and the secular purposes of accommodating quiet meditation or reflection. Since legislation will be held valid unless there is "no question that the statute was motivated wholly by religious considerations," *Lynch*, 104 S.Ct. at 1362, this neutral legislative intent is more than sufficient to satisfy the purpose prong of the tripartite test.

The arguments purporting to demonstrate that moments of silence advance religion exhibit a hypersensi-

tivity far beyond the *Lynch* test of whether a state activity "in reality . . . establishes a religion or religious faith or tends to do so." *Lynch*, 104 S.Ct. at 1361. Challengers assert that the teacher's exercise of her basic authority to require students to sit still and be quiet advances prayer because there is a danger that the students may misinterpret such instructions as requiring them to pray, or even to pray in a certain way, contrary to their own beliefs.

Yet there is no more danger of misinterpretation in this case than in a city's inclusion of a traditional Christian creche in a public Christmas display, or in a state's employment of a chaplain to lead prayer in the legislature or in closing schools and businesses on Sundays and holidays to facilitate group worship. Any concerns about the special susceptibility of children to undue influence are absent in a moment of silence by which a child is free to pursue his thoughts in private, without intrusion from teachers or fellow students. The "advancement" of religion in all these situations is so tenuous that none in reality poses any likelihood of establishing or tending to establish religion.

Nor do moments of silence require the state to become entangled in religious matters. No funds need to be allotted, there is no need for state interference in religious institutions and no threat is posed to normal political process through the use of moments of silence.

History demonstrates that the Framers of the First Amendment intended the federal government to have the power to designate certain times as appropriate for general voluntary prayer. The Framers approved the practice of declaring days of thanksgiving and general prayer. Such days are analogous to moments of silence in that they are entirely voluntary and do not endorse any particular form of worship. They differ from moments of silence in that they set aside an entire day, not just a few minutes, during which children and adults alike are released from the normal routine so that they

may pray if they choose. Certainly, since the Framers wished the government to be able to proclaim days of general thanksgiving, they also would have intended the government to be able to set aside a few moments for voluntary, silent prayer or meditation.

Jefferson and Madison fought to preserve religious freedom, not to abolish it. Both men encouraged moral behavior and the practice of religion according to the dictates of conscience.

Although religious history in the United States reveals some inconsistencies, that history shows an overwhelming commitment to religious freedom and toleration. A moment of silence exemplifies those ideals by permitting students to formulate and retain their private thoughts.

United States citizens regularly set aside moments, even days, to commemorate, reflect or relax. Those occasions range from the solemn and significant, such as Memorial Day or Independence Day, to the lighter respite of the "seventh inning stretch" at a baseball game.

Youths already coping with child-size annoyances such as the rush to school and the chaos of the playground live in an increasingly stressful environment. A moment of silence is a healthy pause in life's daily race. It is a proper exercise of the states' police power to require a moment of quiet during a school child's day so long as the child is free to use that moment as he pleases.

Finally, the moment of silence preserves our most cherished sense of privacy: the freedom to formulate and to keep to ourselves our innermost thoughts and dreams.

ARGUMENT

I. A MOMENT OF SILENCE FOR MEDITATION OR PRAYER AT THE BEGINNING OF THE SCHOOL DAY IN PUBLIC SCHOOL CLASSROOMS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. *INTRODUCTION*

The moment of silence statutes have been challenged by appellees, by the American Civil Liberties Union and the American Jewish Congress as *amici curiae*, and by challengers in similar cases as violative of the First Amendment. *Amici* claim in their brief in support of Appellees' Motion to Dismiss or Affirm as 35-37 that sitting and standing violate a child's constitutional rights because these postures reflect one traditional form of prayer.[1] In *May v. Cooperman*, 572 F.Supp. 1561 (1983), *appeal docketed*, Nos. 83-5890 (3d Cir. Dec. 10, 1983), 84-5126 (3d Cir. Feb. 28, 1984), a seventeen-year old student, after discussion with his family, concluded that sitting still in class during the moment of silence violated his rights and the student asked to leave. While waiting outside the school office for a determination of whether he could be excused from sitting in his classroom during the moment of silence, the student was directed by another teacher to stand still and be quiet. The student refused to do so, claiming that standing quietly in the school hallway was forcing him to pray. 572 F.Supp at 1567. The student and his parent sued.

Thus, opponents of a moment of silence, invoking the intent of the Framers of the Constitution and this Court's decisions, claim a constitutional right to refuse to sit still and be quiet in the classroom or in a hallway

1. *Amici*, citing no authorities, claim that Catholics must kneel to pray and Jews must raise their hands above their heads and that these groups, among others, are deprived of the ability to pray. *Id.*

and at least one judge has found the everyday acts of sitting and standing to violate the First Amendment. It is respectfully submitted that such claims stray far beyond what the Framers or this Court ever intended.

B. *A HOLDING THAT MOMENTS OF SILENCE ARE CONSTITUTIONAL IS CONSISTENT WITH THIS COURT'S HOLDINGS IN THE SPOKEN PRAYER CASES*

The constitutional perimeters of opening exercises in public schools initially were drawn over two decades ago by this Court. *Engel v. Vitale*, 370 U.S. 421 (1962), forbade the use of a state-sponsored, spoken prayer in the New York public school system. One year later, *Abington School District v. Schempp*, 374 U.S. 203 (1963), held that the broadcast of Bible readings and the Lord's Prayer into public school classrooms with class recitation also violated the Constitution.

Nothing in those cases, however, precludes a moment of silence in public schools for silent meditation or prayer. The decisions invalidated state establishment of one particular form of religious exercise, a uniform spoken prayer. The decisions did not mandate hostility against all religion:

> [The First Amendment] requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Education, 330 U.S. 1, 18 (1947) *quoted in Abington School District v. Schempp*, 374 U.S. at 218.

Schempp further noted:

> We agree of course that the State may not establish a "religion of secularism" in the sense of af-

> firmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe."

Id. at 225, *quoting Zorach v. Clauson* 343 U.S. 306, 314 (1952).

A moment of silence is the embodiment of the neutral course charted in *Everson*, *Schempp* and *Engel*. It rests in the delicate balance between the Establishment and Free Exercise clauses of the First Amendment. It accommodates both religion and non-religion while avoiding hostility toward either believers or non-believers. It places no pressure on anyone to compromise his beliefs.[2]

Justice Brennan's *Schempp* concurrence proposed a moment of silence as a non-religious means to serve the secular ends of "fostering harmony among the pupils, enhancing the authority of the teacher, and inspiring better discipline:"[3]

> It has not been shown that . . . the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.[4]

2. Such a moment also harmonizes with the spontaneous remark of Justice Black after announcing his majority opinion in *Engel* on June 25, 1962, that "the prayer of each man must be his own." G. Dunne, *Hugo Black and the Judicial Revolution* at 370 (1977).

3. *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). That discipline has deteriorated to the point where students cloak themselves in the First Amendment to defy a teacher's reasonable request that the student wait quietly in a hallway.

4. *Id.* For further support of the constitutionality and usefulness of the moment of silence suggestion, Justice Brennan cited several sources, including an editorial in the Washington Post urging "a quiet moment that would still the tumult of the playground and start a day of study," Washington Post, June 28, 1962 §A at 22 col. 2, a New York Times article reporting the opinion of the New York Commissioner of Education that silent prayer is constitutional, N.Y. Times, Aug. 30, 1962, §1 at 18, Col. 2, and Choper, *Religion in the Public Schools: a Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 370-371 (1963). *Id.* at 281, n. 57.

Justice Brennan's concurrence was not the only time that a moment of silence was distinguished from spoken prayer in the *Schempp* and *Engel* proceedings. In the *Engel* oral arguments, William J. Butler, Esquire, representing the petitioners, argued for invalidation of the New York Regents' Prayer. The Court posed the following to Mr. Butler:

> THE COURT: Suppose instead of reading the version of any one of these Bibles, there's a provision for five minutes of silence, silent meditation?
> MR. BUTLER: Did you add the word "meditation," Mr. Justice?
> THE COURT: Of silence, for purposes of meditation.
> MR. BUTLER: I can't — I would say that that is not — I don't see any argument for its unconstitutionality.
> THE COURT: That wouldn't bother you? That would not bother you?
> MR. BUTLER: Not as you state it, Your Honor . . .[5]

In *Schempp*, the moment of silence issue was again raised in oral arguments. Leonard J. Kerpelman, Esquire, representing petitioners William J. Murray, III, and Madelyn E. Murray,[6] sought invalidation of the reading of the Bible and the Lord's Prayer in public school opening exercises. The following discussion ensued:

5. 56 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 1039-1040 (Kurland and Casper ed. 1975).

6. In *Murray v. Curlett*, No. 119 (consolidated with *Schempp*, 374 U.S. 203).

THE COURT: I suppose there's no earthly way that the law could enforce a prohibition against a man thinking and praying silently to himself, is there?
MR. KERPELMAN: No question about it, Your Honor. Thoughts come to men unbidden; prayers come to men unbidden. A man sends them to his Maker frequently as a prayer when they come to him. No one, certainly, can — prayer itself cannot be unconstitutional.[7]

Later, the Court asked Mr. Kerpelman directly:

THE COURT: Would your argument be the same if a Quaker pattern was followed and all students requested to remain silent for a minute or two minutes or three minutes?
MR. KERPELMAN: Your Honor, a question which is perhaps involved is a question of standing. Now, as I understand it, standing —
THE COURT: That wasn't my question.
MR. KERPELMAN: Well, I was going to say this, Your Honor, the Quaker ceremony would, it seems to me, be constitutional because it could — I don't see how it could possibly cause anyone any detriment. He does not have to stand up and profess a belief or disbelief in any religion.
THE COURT: Your client could stand there and think about his disbelief in God.
MR. KERPELMAN: Yes, he could, Mr. Stewart, Mr. Justice. And I do not think that that would be unconstitutional.[8]

Thus, even the vigorous and able opponents of spoken prayer in *Engel* and *Schempp* conceded the constitutionality of a moment of silence.

7. 57 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 964 (Kurland and Casper, ed. 1975).

8. *Id.* at 1000-1001.

Several lower courts have found that the moment of silence concept fits within the constitutional boundaries drawn in *Engel* and *Schempp*. *See Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (upholding a minute of silence for meditation or prayer); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (permitting a few moments of silence for private meditation and silent prayer before lunchtime); *Opinion of the Justices*, 113 N.H. 297, 307 A.2d 558 (1973) (upholding voluntary silent meditation).[9]

In addition to the sources which Justice Brennan listed in support of a moment of silence in his *Schempp* concurrence, 374 U.S. at 282 n. 57, many other scholars and authorities have since expressed their belief that a moment of silence in public schools would be constitutional. Professor Tribe opines that because of its arguably non-religious nature, "even a statute *requiring* observance of a brief period of silence or meditation at the opening of the school day would not violate the establishment clause." L. Tribe, *American Constitutional Law* §14-6, 829 (1978) (emphasis in text).

Similarly, Professor Freund has stated: "Nor does any decision, in my judgment, prevent a public school class from engaging in a moment of silent meditation or reverence, as the teachings of the individual spirit or inheritance may prompt." P. Freund, *The Legal Issue*, in P. Freund & R. Ulich, *Religion in the Public Schools* 23 (1965).[10]

9. *But see May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983); *appeal docketed*, Nos. 83-5890 (3d Cir. Dec. 16, 1983); 84-5126 (3d Cir. Feb. 28, 1984); *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013 (D.N.M. 1983); *Beck v. McElrath*, 548 F. Supp. 1161 (D. Tenn. 1982), *appeal dismissed, vacated, remanded, Beck v. Alexander*, 718 F.2d 1098 (1983); *Opinion of the Justices to the House of Representatives*, 387 Mass. 1201, 440 N.E.2d 1159 (1982).

10. *Accord*, Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L.Rev. 1031, 1041 (1963). *See also* Comment, *Ac-*

The following analysis demonstrates that a moment of silence satisfies the First Amendment tests established by this Court.

C. *MOMENTS OF SILENCE, IN REALITY, NEITHER ESTABLISH, NOR TEND TO ESTABLISH A RELIGION OR RELIGIOUS FAITH*

This Court recently stressed that it has never adopted the *Lemon v. Kurtzman* test as the single correct approach in Establishment questions.[11] *Lynch v. Donnelly*, ___ U.S. ___, 104 S.Ct. 1355, 1362 (1984). Rather, this test is only one tool which the Court may use "to determine whether, in reality [the challenged state action] establishes a religion or religious faith, or tends to do so." *Id.* at 1361. However, even application of the traditional three-pronged test in this case demonstrates that, in reality, the statutory authorization of a moment of silence for prayer or meditation neither establishes, nor tends to establish a religion or religious faith.

1. *Secular Purpose*

The Eleventh Circuit held that the objective of Alabama's moment of silence statute was "the advancement

commodating Religion in the Public Schools, 59 Neb. L.Rev. 425, 450-454 (1980) (moment of silence could be utilized as direct substitute for practices struck down in *Engel* and *Abington*); Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-1093 (1967) (period of silence at opening of school day or at lunchtime permissible accommodation); Op. Tenn. Att'y Gen. No. 82-153 (1982); Op. Del. Att'y Gen. No. 79-I011 (1979) (App. 1).

11. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) enunciated "three criteria" to be considered in Establishment claims: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613 (citations omitted).

of religion" and that therefore the statute lacked secular purpose. *Jaffree v. Wallace*, 705 F.2d 1526, 1535 (11th Cir. 1983). The Court of Appeals based this conclusion on testimony in the District Court that one Alabama senator's purpose in sponsoring the legislation had been to return voluntary prayer to public schools. *Jaffree by and through Jaffree v. James*, 544 F. Supp. 727, 731 (S.D. Ala. 1982), *vacated* 554 F. Supp. 1130 (S.D. Ala. 1983).

Lynch stated that legislation is valid under the purpose prong of the three-part test unless there is "no question that the statute was motivated wholly by religious considerations." *Lynch*, 104 S.Ct. at 1362. Alabama's statute provides a moment of silence for "meditation or voluntary prayer." Ala. Code §16-1-20.1 (1981). The Delaware statute, Del. Code Ann. tit. 14, §4101(b) (1975), provides "2 or 3 minutes to voluntarily participate in moral, philosophic, patriotic or religious activity." These statutes, on their face, unambiguously provide for both secular and non-secular activities. The legislatures appear to have been motivated by a good faith desire to accommodate students wishing to open the school day with silent prayer while simultaneously encouraging all students to develop habits of introspection, and in Delaware at least, to accommodate reflection on moral, philosophic and patriotic values. These purposes are secular, not religious.[12] That individual legislators may have considered accommodation of prayer to be more important

12. Other secular purposes may also be served:

> Children frequently engage in games or noisy conversation as they journey to the schoolhouse, and school officials may well determine that a period of silence at the beginning of the school day is a useful expedient for calming the students so that they are prepared to take their studies seriously. Any reverent attitude which would prevail during the silent periods would be merely incidental to the secular purpose of quieting the students.

Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1093 (1967).

than accommodation of meditation cannot negate the fact that the statutes as enacted facilitate both meditation and prayer, and thus have secular as well as religious purposes.[13]

This case is clearly distinguishable from *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*), in which this Court found the Ten Commandments to be "undeniably . . . sacred" notwithstanding a stated, albeit transparent, secular purpose. *Stone v. Graham*, 449 U.S. at 41. A moment of silence, however, is not inherently fraught with religious significance. Its religious meaning, or lack thereof, depends wholly on the choice of each participant. Therefore, where the legislature plainly intends the moment to be used for both religious and secular purposes, it cannot be inferred that only the religious purpose is genuine. *See Gaines v. Anderson*, 421 F. Supp. 337, 343 (D. Mass. 1976).

2. *Primary Effect*

The moment of silence is the embodiment of that "wholesome 'neutrality' " which *Schempp* advocated. 374 U.S. at 222. It requires only that students sit quietly for a few minutes or less, during which time they may pray, meditate, reflect or merely doze, as they choose. It does not encourage prayer; it merely accommodates those students whose individual consciences direct them to pray. Because it is conducted in silence, it invades no child's private thoughts and thus is entirely free from those elements of coercion and indoctrination which characterized the Bible-reading and spoken prayer in

13. The lower court cases which have held that moments of silence do not meet the requirement of a secular purpose have done so on the ground that the secular purpose must be "primary," *Beck v. McElrath*, 548 F. Supp. 1161, 1165 (M.D. Tenn. 1982), *appeal dismissed, vacated, remanded, Beck v. Alexander*, 718 F.2d 1098 (1983), or "overwhelming," *May v. Cooperman*, 572 F. Supp. at 1572. If this ever was the correct standard, clearly, under *Lynch*, it no longer is.

Schempp, 374 U.S. at 223, and *Engel v. Vitale*, 370 U.S. at 431-32.

Although some courts have opined that moments of silence advance religion, their reasoning is stilted. Two cases, *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013, 1021 (D.N.M. 1983), and *Beck v. McElrath*, 548 F. Supp. at 1101, simply fail to analyze the "effect" prong of the *Lemon* test separately from the "purpose" prong. Since these cases find that the purpose of moment of silence legislation is to promote religion, they find the effect to be a foregone conclusion. However, since moments of silence are supported by valid secular purposes, the effect prong must be given more attention.

May v. Cooperman held that the New Jersey moment of silence statute both advanced and inhibited religion. The court found that the statute advanced religion by "mandating a period when all students and teachers must assume the traditional posture of prayer of some religious groups. . ." *Cooperman*, 572 F. Supp. at 1574. Although the challenged statute was entirely silent on the question of required posture, one New Jersey school required students to sit with eyes closed, and one to stand with heads lowered and eyes closed during the silent period.[14] *Id. Cooperman* also apparently found offensive a simple sitting or standing requirement. *Id.* at 1569. However, the court suggested no alternatives to sitting or standing throughout the school day.

As this Court recently acknowledged in *Lynch*, "Comparisons of the relative benefits to religion of different forms of governmental support are elusive and diffi-

14. Whether such posture requirements actually advance religion is beyond the scope of this brief. The district court, however, based its invalidation of the statute in part on its erroneous finding that the statute mandated certain postures. 572 F. Supp. at 1575. If, in fact, such requirements do advance religion, surely the remedy is to invalidate the additional posture requirements, and not the moment of silence itself.

cult to make." *Lynch*, 104 S.Ct. at 1363. *Lynch* found that including a creche in a city Christmas display was no more an endorsement of religion than Sunday Closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961); release time for religous training, *Zorach v. Clauson*, 343 U.S. 306 (1952); and legislative prayers, *Marsh v. Chambers*, ____ U.S. ____, 103 S.Ct. 3330 (1983). *Lynch*, 104 S.Ct. at 1363. By no stretch of the imagination can moments of silence be considered a greater aid to religion than any of these previously approved state activities. A moment of silence requires the suspension of activity for a few minutes at most, far less than the entire day set aside by Sunday Closing Laws. Like a release time program, it requires no student to participate in, or even to be aware of, another student's devotions.

Appellees may try to distinguish *Marsh* or *Lynch* on the basis that school children may be susceptible to pressure from teachers and peers.[15] Unlike *Marsh's* spoken invocation by a chaplain, the classroom activity at issue here is a pure moment of silence. It is free from coercion by teachers or other students.

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15. Appellees claim that the moment is just long enough for a student to recite the Lord's Prayer. Motion to Affirm at 10. Appellees insinuate that the state is therefore attempting to force children to recite the prayer silently to the exclusion of other activity. *Id.* This theory is akin to a teacher giving each student $5.00 with no spending restrictions. The student can save the money, buy a novel, a record, or a vast quantity of gum, as he pleases. It is ludicrous to claim that since a particular religious record might cost about $5.00 that the teacher is forcing the student to purchase that record over the other spending options. The moment of silence is even more impervious to coercion because the student need never disclose how the moment was spent.

The fear of peer pressure is equally unfounded. The sight of one quiet child will not force another child to recite a prayer to herself. Further, proponents of the peer pressure argument do not suggest that children be prohibited from wearing yarmulkes or crosses to school for fear of forcing other children to follow suit.

3. *Entanglement*

The Court of Appeals made no finding as to whether the Alabama moment of silence statute resulted in impermissible entanglement between church and state. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). In fact, such statutes do not require the state to interfere in any way with the administrative affairs of any church or sect, nor do they carry a potential for political divisiveness.

Only one case has held that moments of silence create problems of administrative entanglement, and in that case, the court simply seems to have lost sight of the meaning of the test. *Duffy*, 557 F. Supp. 1013, held that the monitoring of teachers by the school superintendent and school board to ensure that the moment of silence was administered in a non-religious fashion would constitute administrative entanglement between church and state. *Id.* at 1021. *Duffy* overlooked the fact that the state would be monitoring its own activities, not those of any church or sect. The core of the finding of administrative entanglement in *Lemon* was that the challenged activity required state surveillance or active interference with the administrative affairs of a religious institution. *Lemon*, 403 U.S. at 620. It requires a perverse mutation of *Lemon's* reasoning to conclude that the entanglement prong of the tripartite test prohibits a state from monitoring state activities.

Nor do moments of silence present a politically divisive potential. Under *Mueller v. Allen*, ____ U.S. ____, 103 S.Ct. 3062, 3071, n. 11 (1983) the political divisiness inquiry is limited to those cases which involve direct financial subsidies to parochial schools or school teachers. This is not such a case.

II. HISTORY SHOWS THAT THE FRAMERS OF THE FIRST AMENDMENT INTENDED THE GOVERNMENT TO HAVE THE POWER TO DESIGNATE TIMES APPROPRIATE FOR GENERAL PRAYER

Recently, this Court examined the practices of the First Congress and concluded that since the Framers of the First Amendment authorized the appointment of paid chaplains to serve the Congress just three days before they reached agreement on the language of the First Amendment, the Framers did not regard paid chaplains and opening invocations in the legislature to be a violation of the First Amendment. *Marsh v. Chambers*, ____ U.S. ____, 103 S.Ct. 3330, 3333-34 (1983). As this Court succinctly stated, "[t]heir actions reveal their intent." *Id.* at 3334.

In *Marsh*, this Court could look at the Framers' actions on the precise issue it had before it. Here, such an exact analogy is not possible, as moments of silence are of comparatively recent vintage. However, the Framers' actions in regard to a comparable, and, if anything, far more coercive, practice — the declaration of days of public prayer and thanksgiving — prove enlightening.

The first national day of thanksgiving proclaimed by the government of the United States was held on December 18, 1777[16] and, as *Lynch v. Donnelly*, ____ U.S. ____, 104 S.Ct. 1355 (1984) noted, the practice has continued with little interruption to the present day. *Lynch*, 104 S.Ct. at 1360, n.2.

These officially sponsored holidays are analagous to moments of silence in that they set aside a period of time in order that people may pray, if they choose. Children are given a school holiday in order that they may attend church, or other community or family functions. As with moments of silence, the opportunity for prayer is made

16. A Stokes & L. Pfeffer, *Church and State in the United States*, 504 (rev. 1st ed. 1964).

available to children and adults alike, but prayer is not compelled, nor is any form of worship given official recognition.

However, days of thanksgiving, in direct contrast to moments of silence, are fraught with express religious overtones. The presidential proclamations issued on days of thanksgiving were and often are still overtly religious.[17] Moreover, instead of occupying just a few seconds or a few minutes, days of thanksgiving interrupt the normal activities of schools and businesses for an entire day.

Despite the comparatively severe intrusion of government into religion which the proclamation of days of thanksgiving represent, the drafters intended the First Amendment to permit such proclamations. On September 25, 1789, the day after the Congress reached agreement on the wording of the First Amendment and recommended it to the states for ratification, Congress resolved to petition President Washington to proclaim a day of public thanksgiving and prayer.[18] The resolution carried despite one member's objection that religious

17. The proclamation issued by President Washington in 1789 at the request of the First Congress is a case in point. It reads, in part:

> . . .I do recommend and assign Thursday, the 20th day of November next, to be devoted by people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation . . ."

R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 52 (1982). On September 15, 1983, President Reagan issued a Thanksgiving Proclamation stating in part, "I call upon Americans to affirm this day of thanks by their prayers and their gratitude for the many blessings upon their land and its people." Proclamation No. 5098, 48 Fed. Reg. 42, 801 (1983).

18. Cord, *supra* n.17 at 28.

matters were proscribed to the federal government.[19] It must be inferred, therefore, that the members of the First Congress expressly considered and rejected the notion that the First Amendment prohibited the federal government from designating times recommended for public prayer.[20]

Like the power to appoint paid chaplains for the legislature, the power to designate certain times as appropriate for those who wish to offer prayers, in the manner which suits them, is one which the Framers of the First Amendment earnestly debated. That the First Congress and three of the first four presidents believed that the new government had this power is "contemporaneous and weighty evidence" of the true meaning of the First Amendment. *Marsh*, 103 S.Ct. at 3334. A government which may set aside an entire day for the express purpose of encouraging children and adults alike to offer prayers and give thanks to God, certainly may designate a few minutes or less of the school day as a time for students to engage in quiet thought or prayer.

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19. *Id.* at 28.

20. Of the first four presidents, three believed, while in office, that the government had the power to designate times appropriate for general prayer through thanksgiving proclamations. Stokes & Pfeffer, *supra* n.16 at 87-89. Thomas Jefferson was the only one of the earliest presidents who did not issue such proclamations, and his objection was not that such action would be an intolerable intrusion of the state into the religious affairs of private citizens, but that it would be a federal usurpation of power reserved to the state. Letter to Rev. Miller, Jan. 23, 1808. 9 *The Writings of Thomas Jefferson* 174 (P. Ford ed. 1899). As a member of the committee appointed in 1776 to revise Virginia law, Jefferson recommended a "Bill for Appointing Days of Public Fasting and Thanksgiving," R. Healey, *Jefferson on Religion in Public Education*, 135 (1962), and in his autobiography, he relates how he used such a proclamation to stir up the citizenry against the British. *Autobiography*. 1 Ford, *supra* at 9-11.

James Madison issued at least four proclamations designating days of prayer and thanksgiving during his presidency. Cord, *supra* n. 17 at 31. Although he later theorized that such proclamations might be beyond the power of the federal government, *id.* at 30, his

The Framers also breached the wall of separation in other ways as evidenced by the United States' frequent money and land grants for churches and ministers in the early years of the nation. Madison, Jefferson, Washington, Monroe, and John Quincy Adams all participated in treaties with the Indians which appropriated such moneys.[21]

Sunday closing laws, also religious in nature, were apparently consistent with the Framers' concept of the First Amendment.[22] Nor is there evidence that Jefferson

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actions as president, because more closely contemporaneous with the adoption of the First Amendment, are better evidence of what Madison intended the amendment to mean. Moreover, Madison justified his actions in these terms: "I was always careful to make the proclamation absolutely indiscriminate, and merely recommendatory; or rather, mere designations of a day on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith and forms." Letter to Edward Livingston, July 10, 1822, *The Complete Madison* 308 (S. Padover ed. 1953). Thus the features which redeemed thanksgiving proclamations in Madison's eyes are precisely those features which moments of silence share: their non-coercive nature as mere designations of a time available for prayer, and their non-discriminatory treatment of all faiths.

21. Cord, *supra* n. 17 at 41 (1787 Continental Congress' grant of lands in trust to the Moravian Brethren to promote Christian religion among Indians. James Madison was a member of the conveying committee); *Id.* at 54 (First, Second and Third Congress authorizing appointment of paid military chaplains); *Id.* at 58 (President Washington's 1779 Treaty authorizing funds to build a church for the Indians); *Id.* at 38-39 (President Jefferson's 1803 treaty with the Kaskaskia Indians, including grants to pay for a church and a Catholic priest); *Id.* at 59 (President Monroe's Indian Treaty of 1819 granting land for the use of the Catholic Church); *Id.* (President John Quincy Adams' provision for a missionary establishment in an 1825 Indian Treaty); *Id.* at 71 (Adams' Fourth Annual Message to Congress outlining a policy of converting Indians to Christianity and of religious education). Presidents Jackson and Van Buren continued the practice of granting money or land to churches through treaties. *Id.*

22. For a discussion of Madison's sponsorship of Sunday closing laws and a proposed penalty for Sabbath breakers, see *McGowan v. Maryland*, 366 U.S. 420, 437-39 (1961).

or Madison objected to tax exemptions for churches.[23]

Thomas Jefferson's own perspective on education is fully consistent with a moment of silence for prayer or meditation. Jefferson was a firm believer in moral and ethical conduct.[24] True, he fought hard against the establishment of an official religion, but Jefferson sought to preserve religious freedom, not to abolish all religion or to eradicate any system of morals or values.[25]

Jefferson also recognized the value of a brief respite in the course of study:

> There are portions of the day too when the mind should be eased, particularly after dinner it should be applied to lighter occupation: history is of this kind. It exercises principally the memory. Reflection also indeed is necessary but not generally in a laborious degree.[26]

James Madison may have quarreled with overbearing clergy,[27] but never with the right of citizens to practice their own religion:

> The Religion then of every man must be left to the convictions and conscience of every man; and it is the right of every man to exercise it as these may dictate.[28]

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23. Cord, *supra* n. 17 at 190.

24. Healy, *supra* n. 20 at 144-145. *See also* Jefferson's letter to Peter Carr, Aug. 10, 1787, in 4 Ford, *supra* n. 20 at 427-428.

25. In fact, Jefferson anticipated that students would be expected to attend religious services at or near the university with the students' particular sect. Cord, *supra* n. 17 at 155, *quoting* "The University of Virginia, Regulations," October 4, 1824.

26. Letter to Thomas Mann Randolph, Jr., Aug. 27, 1786 (outlining a course of study) in 4 Ford, *supra* n. 20 at 291.

27. Padover, *supra* n. 20 at 298.

28. Memorial and Remonstrance Against Religious Assessment, 1785, in Padover, *supra* n. 20 at 299-300. Madison further stated: "The sacred obligations of religion flow from the due exercise of opinion, in the solemn discharge of which man is accountable to his God alone. . . ." Address to the General Assembly of Virginia, January 23, 1799. *Id.* at 296.

The moment of silence preserves the right of each student to listen to the dictates of his or her own conscience.

Much can be said of the Framers' intent with regard to Freedom of Religion. Contradictory evidence can be marshalled by each party in this case, for history is replete with inconsistency. Whatever else can be said of the historical light cast by our forefathers, however, this much is true: a principal reason for our ancestors' flight to this new world was the quest for religious freedom.

That freedom was hard won and imperfectly executed. Free exercise has been freer for some faiths than others, and some faiths have come closer to establishment than others. Nonetheless, one of our nation's oldest and highest ideals has been that of religious freedom and toleration. We pride ourselves in our freedom to possess our innermost thoughts and deepest beliefs.

A moment of silence, while harming no one, preserves that freedom of thought, that right to private faith, for each school child.

III. A MOMENT OF SILENCE IS A COMMON PRACTICE IN EVERYDAY LIFE AND AN APPROPRIATE AND VALUABLE ASSET TO CHILD DEVELOPMENT.

America is steeped in a tradition which pauses to commemorate persons, events, and customs. A moment of silence, rather than being a purely religious observance, echoes the national practice of reflection.

We celebrate national holidays, such as Memorial Day, in which we remember those who died in service to the United States. The President is authorized and requested, pursuant to 36 U.S.C. §169g (1950) ("Memorial Day as a day of prayer for permanent peace"), to call upon us to pray:

> . . . each in accordance with his religious faith, for permanent peace; designating a period during such

> a day in which all the people of the United States may unite in prayer for a permanent peace; calling upon all the people . . . to unite in prayer at such time . . .[29]

We sometimes bring our daily activities to a halt in memory of one who has just died. For example, this Court declared a recess upon the death of Herbert Hoover "as a mark of respect to the memory of the former President." Proceedings on the Death of Mr. Herbert Hoover, 379 U.S. vii (1964).

Even our cultural and leisure events sponsor pauses in the routine. The theatres on Broadway darken for a moment on the death of a Broadway star. Television news shows project a picture without commentary upon the death of a national figure. Charles Kurault on *CBS News Sunday Morning* regularly ends the broadcast with a brief segment, without dialogue, which shows some aspect of man or nature which merits our reflection. Thousands of sports enthusiasts in baseball stadiums pause to remember a deceased sports hero; in lighter moments, players and fans take a "seventh inning stretch."

Challengers may claim that because children are young and vulnerable, a moment of silence may harm

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29. Independence Day is another such day. It was celebrated and treasured by Thomas Jefferson and John Adams, two of those who gave us the legacy of independence. 10 *The Writings of Thomas Jefferson*, 390-91 (Ford ed. 1899); *The Selected Writings of John and John Quincy Adams*, xxxiii (Koch and Peden ed. 1946). *See also* 36 U.S.C. §169h (1952) ("National Day of Prayer", for "prayer and meditation at churches, in groups, and as individuals"); Proc. No. 4411, December 31, 1975, 41 F.R. 1035 (Urging reflection during the Bicentennial Year on the "historic events of the past . . . and on . . . those who helped shape our constitutional government"); and 36 U.S.C. §149 (1937) (Commemorating Thomas Jefferson's birth by observance "in schools and churches, or other suitable places . . ."); as examples of national observances which ask us to think, remember, and pray as we wish.

them. On the contrary, a moment of silence is particularly helpful for children. Children may not face the same types of stress that confront adults; nonetheless, we can all recall the worries over grades, the criticisms from one's peers and the relationships with both parents and teachers which once loomed large in our lives.

"Time out" in a child's day provides a time to reflect, a time to "regroup" and to arm one's self for the daily battles of life:

> . . . [T]he unrelieved, generalized stress that is pervasive in modern life is nothing but destructive to children. Children need to acquire skills that will enable them from time to time to pull back from the turmoil. They must learn how to turn inward. By turning inward I mean developing an inner awareness—an ability to find and enjoy the quietness and stillness of the inner self. If children never learn how to turn inward they may be affected adversely by unrelieved stress. It's not, however, simply a question of shutting off the external world. I tell the children to think of something quiet. I tell them to think of something inside themselves — to turn their eyes inward. The desired effect is to change their attention, however briefly, from the hectic, external world to the more peaceful world of mind and thought and fantasy.

C. Cherry, *Think of Something Quiet: A Guide for Achieving Serenity in Early Childhood Classrooms* 3-4 (1981).

On a less dramatic scale, the moment of silence in opening exercises helps to calm the child from the morning worries — the run to the bus, the forgotten lunch, the unfinished homework, the fumble with coat and books — and eases the child into a mood more conducive to learning. It acts as a natural "buffer" between the race against the school bell and the quest for knowl-

edge. It also assists the teacher to create a learning atmosphere free of distraction from the normal chaos at the start of the day. It is a part of our nature to suspend our rush through the day and allow ourselves a moment to reflect. We are free to cherish that moment or allow it to pass indifferently. We are free to do so, because we shelter our private thoughts, however shallow or lofty, free from the intrusion of others.

If such quiet thoughts amount to a religious ceremony, then logic dictates a prohibition of thinking in school. Destruction of our freedom to think stands the First Amendment on its head.

May v. Cooperman, 572 F. Supp. 1561, 1574-75 (D.N.J. 1983), *appeal docketed*, Nos. 83-5890 (3rd Cir. Dec. 10, 1983), 84-5126 (3rd Cir. Feb. 28, 1984) held that a requirement that students remain seated or standing during a moment of silence violated free exercise and simultaneously improperly reflected "one traditional form of prayer."[30] Presumably those postures must offend at anytime, not just during opening exercises. There are few conceivable positions remaining, however, for students to assume. Most public school students will be found "guilty" of sitting or standing during the school day.

With the lower courts leading the charge, society has hurtled past common sense on the way to the Constitution. It is inconceivable that students claim a constitutional right not to think, parents invoke the Constitution to challenge a teacher's fundamental authority to ask students to sit still and be quiet, and judges find sitting and standing to violate the First Amendment.

We respectfully ask the Court to help find our way back to the Constitution and to reason.

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30. This argument is also asserted here, in the Brief of the American Civil Liberties Union and the American Jewish Congress as Amici Curiae in Support of the Motion to Dismiss or Affirm, No. 83-812 at 35-37.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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July, 1984

APPENDIX

OPINION OF THE ATTORNEY GENERAL
OF THE STATE OF DELAWARE
NO. 79-I011

April 12, 1979

Honorable W. Lee Littleton
Senator
Legislative Hall
Dover, Delaware 19901

Re: Voluntary Prayer in Public Schools
Opinion No. 79-I011

Dear Senator Littleton:

You have asked the opinion of this Office on a number of questions related to prayer in the public schools. We will address those questions seriatim.

First you have asked whether 61 *Del. Laws* c. 547 ("the Act") permits voluntary prayer in public schools. The language of 14 *Del. C.* §4101(b), as amended by the Act, provides:

> [D]uring the initial period of study on each school day all students in the public schools of Delaware shall be granted two or three minutes to voluntarily participate in moral, philosophical, patriotic or religious activity. For the purposes of this section, 'religious activity' shall include voluntary prayer at the beginning of each school day." (Underscored language was added by the Act.)

The plain language of the Act and its synopsis indicate clear legislative intent to permit prayer as an exercise which a student may choose. The key words in the Act should be construed according to their usual, ordinary and natural meaning. *McGinnes v. Department of Finance*, Del. Ch., 337 A.2d 16, 20 (1977). We note, however, that federal constitutional principles mandate that this be a silent exercise.

The First Amendment to the United States Constitution, which is also applicable to the States, provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The United States Supreme Court has held that the First Amendment prohibits recitation of prayer in the public schools. *School District of Abington Township v. Schempp*, 374 U.S. 203, (1963). That decision does not necessarily forbid a period of silence for pupil meditation. As Justice Brennan said in his concurring opinion in *Schempp*:

> It has not been shown that . . . the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government. *Id.* at 279.

In considering proposed legislation authorizing a period of silent meditation in schools the Justices of the New Hampshire Supreme Court concluded:

> [N]either the encouragement nor authorization of voluntary silent meditation . . . violates the First Amendment to the Constitution of the United States as interpreted by the United States Supreme Court. *Opinion of the Justices*, N.H. Supr., 307 A.2d 558, 560 (1973).

Similarly, 14 *Del. C.* §4101(b), insofar as it authorizes silent prayer among other activities of a non-religious nature, does not violate the First Amendment.

You have also asked whether students who choose not to participate in activities permitted under 14 *Del. C.* §4101(b) may be excused from the classroom so that the remaining students may pray audibly. The Supreme Court held in *School District of Abington Township v.*

Schempp, supra, that the First Amendment requires courts to ask the following question in reviewing the propriety of State Laws affecting religion:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. . 374 U.S. at 222.

In the *Schempp* case the Supreme Court dealt with challenges to a Pennsylvania law which required the daily reading of ten verses from the Bible and a Maryland law which required daily Bible readings and recitation of the Lord's Prayer. Both statutory schemes permitted children to be excused if parents so requested. Both Maryland and Pennsylvania defended their daily religious exercises in part by arguing that children who requested exemption from the activities were not required to participate. One of the plaintiff-parents in the Pennsylvania case argued that if a child regularly absented himself or herself from the classroom during the religious exercises, the "children's relationships with their teachers and classmates would be adversely affected." 374 U.S. at 208.

The Supreme Court ruled that both statutory programs violated the First Amendment. The Court also rejected the defense raised by the two states that the "voluntariness" of the programs saved them from legal attack. The Court said:

> Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality. . . . *Id.* at 224-225.

In the *Schempp* case, the Supreme Court followed *Engel v. Vitale*, 370 U.S. 421 (1962), a case decided the year before. That case voided a New York program in which students were to recite a brief standard prayer. Though participation in the prayer was voluntary, the Court held that:

> [n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . of the First Amendment. *Id.* at 430.

These cases, when read together, indicate that even if a student or group of students object to and are excused from some concerted religious exercise, the Court will disapprove of the State program if the "purpose and effect" of the plan is to advance or inhibit religion. You suggest a scheme in which all nonparticipants leave a classroom while all participants remain behind to recite a voluntary audible prayer. It is likely that the Supreme Court would find that such a plan has the "purpose and effect" of advancing the religion of those remaining in the classroom and therefore would not pass muster under the First Amendment to the United States Constitution. The effect would be to:

> aid those religions based on a belief in the existence of God as against those religions (or non-religions) founded on different beliefs. *Torcaso v. Watkins*, 367 U.S. 488 (1961), cited with approval in *University of Delaware v. Keegan*, Del. Ch., 318 A.2d 135 (1974), rev'd. on other grounds, Del. Supr., 349 A.2d 14 (1975).

Further, it is likely that based upon the authorities discussed above, the "voluntariness" of the program proposed would not save it from constitutional infirmity.*

Since the answer to the second question is negative, a response to the third question is not necessary. If you have any questions concerning this opinion, please do not hesitate to contact me.

Sincerely,

/s/
Roger A. Akin
Deputy Attorney General

APPROVED:

/s/
Richard S. Gebelein
Attorney General

* It should be noted that the courts have felt that the removal of children from the room creates a stigma as to those children not participating in the exercises thereby applying peer pressure to participate. Thus the courts conclude that the effect is state action to encourage religion.